IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.662 OF 1999

Sachin Ganpat Badambe]
aged about 21 years,]
R/o.Tata Housing Complex,] Appellant
Room 804, Ramtekdi Road,]
Sewri, Mumbai 20.]
At present detained in Yerwada]
Central Prison, Pune.]

versus

The State of Maharashtra] Respondent

Mr.Shirish Gupte, Sr.Counsel with Smt.Sharmila Kaushik for the appellant.
Dr.F.R.Shaikh, APP, for the State.

WITH

CRIMINAL APPEAL NO.626 OF 1999

1] Shri Sanjay Sudhakar Kage]
2] Satish Rawaji Karangutkar] Appellants.
@ Banty]
Both resident of Sector 17] (Original
Room No.316, Koper Khairane] Accused Nos.

Vashi, New Mumbai.] 2 and 4.
(at present detained in Jail)]
at Yeravada Central Prison]
Pune.]

versus

The State of Maharashtra] Respondent.

Mr.Prakash Naik for the appellants.
Dr.F.R.Shaikh, APP, for the State.

WITH

CRIMINAL APPEAL NO.663 OF 1999

Yogendra Singh @ Sonu]
S/o.Narsingh Bahadur Singh]
Aged 19 years, residing at Bori] Appellant.
Chawl, Chal No.55/56, Room] (Original
No.16, Ram Takede Road, Sewree] Accused No.1.
Mumbai 400 015.]

versus

The State of Maharashtra] Respondent.

Mr.Ashok Mundergi, Sr.Counsel, with Mr.Rajendra Sorankar for the appellant.
Dr.F.R.Shaikh, APP, for the State.

CORAM : D.G.DESHPANDE &

V.M.KANADE, JJ.

DATED : 6th December 2005.

JUDGEMENT [PER D.G.DESHPANDE, J.] :-

1. All the three appeals have been filed by originally convicted accused. Appeal No.663 of 1999 is filed original accused No.1 - Yogendra Singh @ Sonu S/o.Narsingh Bahadur Singh. Appeal No.626 of 1999 is filed by original accused No. 2 - Sanjay Sudhakar Kage and original accused No.4 - Satish Rawaji Karangutkar. And Appeal No.662 of 1999 is filed by original accused No.3 Sachin Ganpat Badambe.

2. Accused No.3 was represented by learned counsel Mr.Shirish Gupte, Accused Nos. 2 and 4 were represented by advocate Mr.Prakash Naik. and, accused No.1 was represented by learned counsel Mr.Ashok Mundergi.

3. All the accused/appellants were convicted under Section 302 r/w. 34 of the Indian Penal

Code for murdering Sudhesh Manohar Khamkar. Deceased Khamkar was running a company as "Rexo Company" and manufacturing and fabrication of bearing for the trolleys in Industrial Gala No.74. Accused No.4 Satish was employed by Khamkar for some time and was discontinued by deceased Sudhesh Khamkar. His wages were settled. But accused No.4 was not satisfied with the settlement and he used to make phone calls to deceased Khamkar with threats and dire consequences. One of such calls was allegedly made on 20.2.1997 at around 12.00 noon.

4. The incident occurred on 22.2.1997 in the industrial gala of deceased Khamkar at about 4.00 p.m.. All these accused came to the industrial gala, enquired about deceased Khamkar. He was in adjoining industrial unit. He was called at his unit and then all these accused wiped out their weapons. Accused NO.4 Satish was having revolver. He fired two shots and others attacked deceased Khamkar with chopper, Khanjir (dagger) or knife causing injuries on his head, abdomen, fore-arms, chest, neck etc. and then they fled away. This incident was watched and seen by four employees of Khamkar. Body of Khamkar was taken

to the hospital where he succumbed to the injuries. In the mean time PSI Narayan Balaji Sable (PW 30), who was on duty as S.H.O of N.M.Joshi Marg Police Station, received a telephonic call at 16.15 hrs. about the incident. He informed it to the duty P.I. Patil (PW 32) and the police party proceeded to the spot. Statement of P.W.1 Ashok Nivrutti Ghorpade was recorded as Exhibit 12. It was treated as F.I.R. Further investigation was carried out. Panchanama of scene of offence was prepared. Dagger lying on the spot was sealed. Inquest report was prepared followed by post mortem report. It transpired during enquiry that the appellants escaped in a Taxi MMQ-132. Driver was apprehended. Blood scrapping, currency notes and empty cartridges were taken charge of. Enquiry from other employees, who were present at the spot, was made. The statements of the witnesses were recorded. From the post mortem one lead piece of bullet was extracted. Dr.Shinde (PW 18) completed the post mortem. Prepared his report. Blood stained clothes of the deceased were sent to the Chemical Analyser.

5. On 4.3.1997 Accused No.2 Sanjay Kage was

arrested by Mahatma Phule Police Station, Kalyan. Enquiry from him was made. Names of other accused were disclosed. He was transferred in this case. Thereafter on 17.3.1997 accused No.2 made voluntary statement leading to disclosure of his blood stains clothes. There was injury on the person of accused No.2. The doctors, who had treated the accused on that day i.e. on the date of incident 22.2.1997, were also questioned and their statements were recorded. One of such doctors was Dr.Pol (PW 25).

6. On 7.3.1997 Accused No.1 - Yogendra was arrested. He also made voluntary statement under Section 27 of the Evidence Act and the clothes, which he had put on at the time of assault, were recovered under panchanama. This accused had an injury to his right hand. Statement of Dr.Shah (PW 9), who had treated him, was also recorded.

7. On 26.3.1997 accused No.3 Sachin was brought his father. He was arrested. At his instance, a chopper and a full pant were recovered under panchanama. All the articles so far recovered and seized from the spot or from the accused were sent to the C.A. Accused Nos.

1, 2 and 3 were put in identification parade which was carried out by SEM Medhekar (PW 19). By that time, accused No.4 could not be arrested, therefore, he was shown as wanted accused and, a charge sheet came to be filed against accused Nos. 1, 2 and 3. Thereafter accused No.4 - Satish was arrested by Bazarpeth Police Station on 14.4.1998. He was transferred in this case. He was also put in identification parade which was conducted on 12.6.1998. When the accused was arrested by Bazarpeth Police Station, they had recovered empty cartridges and a pistol from accused No.4. They were sent to C.A. Separate charge sheet against accused No.4 was filed. Thereafter both the sessions cases were clubbed and tried together.

8. The prosecution has examined in all 30 witnesses in this case. The defence of the accused was of total denial and that of falsely implicating them at the instance of the relatives of deceased Khamkar. Accused No.4, in particular, raised this defence and according to him, because of the dispute between him and deceased Khamkar, he has been falsely implicated. The trial court, after scrutiny of the entire

evidence, which included evidence of four eye witnesses i.e. P.W.1 to 4; evidence of recovery, report of the C.A. and post mortem report and other circumstances, came to the conclusion that the accused were guilty of offences charged, therefore, they were convicted as stated above and, hence these three appeals.

9. No serious dispute or dispute of any kind was raised by any of the defence counsel that deceased Khamkar died a homicidal death. As per the report of the doctor, who has conducted the post mortem, i.e. Dr.Ashok Shinde, he noticed in all 34 injuries, out of which, Injury Nos. 1 to 4 are incised wounds; Injury No.5 is incised stab wound; Injury No.6 is a fire arm wound of entry; Injury No.7 is a fire arm wound of exit; Injury No.8 is a fire arm wound of entry; Injury No.9 is a fire arm wound of exit, both the injuries are on chest. Then Injury Nos.10, 11, 12, 13, 14, 20, 21, 23, 24, 26, 29 and 30 are the incised wounds. Injury Nos.15, 16, 17, and 18 are incised stab wounds. Injury Nos.19, 22, 28 are linear abrasion. Injury No.25 is cutting of bone. Injury No.27 is abrasion. Injury Nos. 31 and 33 are fire arm wounds of entry. Injury

No.33 is fire arm wound of exit. And lastly Injury No.34 is swelling.

. It will be clear that all these injuries were fatal and caused on vital parts of the body including chest, abdomen and as a result Khamkar died. Also there were injuries on head. The cause of death, according to the doctor, was haemorrhage and shock due to multiple incised stab wound and incised wounds with fire arm wounds (unnatural). Further according to the doctor, Injury Nos. 5, 10, 15, 16, 17, 18 and 33 individually were sufficient to cause death in ordinary course of nature and, all these injuries from 1 to 34 cumulatively cause death. These injuries were caused by sharp edge heavy weapons like chopper, sword etc. The doctor has noticed four fire arm entry wounds on the death body. Regarding firm arm injuries, the doctor opined in his cross examination that they were fired from a distance of 3 ft. This report itself clearly and undoubtedly proves that Sudhesh Khamkar died a homicidal death. There was no challenge at all to this aspect of the matter.

10. General challenge to the prosecution case

and the evidence by all the accused was mostly and mainly regarding identification parades. According to them, the norms laid down for identification parade were not adhere to. The police officer in the first identification parade was present at the time and place. Panchas who were present at the time of parade were not examined. The SEM, who conducted 1st three parades has, as per his deposition, admitted that he had written the notes and then prepared the memorandum but the notes were not produced and, therefore, the memorandum cannot be said to have been proved, particularly when the panchas were not examined. So far as accused No.3 is concerned, he was wearing spects and in the identification parade since he was the only person wearing spect, he could be easily identified. Then there is actual difference between height of the accused as noticed by the witnesses in the court and actual height, while selecting dummies, the persons resemblance to the appearance of the suspects were not kept and, therefore for all these reasons the evidence of identification parade led by the prosecution cannot be believed at all and, if that evidence goes away, then in any case the accused were

entitled for acquittal.

11. Regarding discovery of incriminating articles from the accused, it was general contention that those discoveries were not proved. The statements of the accused leading to the discoveries were not proved. The incriminating articles were recovered from the open spot or place and, there is no connecting link establishing participation of the accused in the offence on basis of this recovery.

12. Regarding the evidence of four eye witnesses i.e. P.W. 1 to 4, it was contended that they are the employees of deceased Khamkar and they are supporting the prosecution with a view to vengeance upon the death of their employer. It was also contended that even if four persons were there on the spot and the police came to know from them about the assailants and even though all the four persons were detained in the police station from the evening of 22.2.1997 till next day morning, their statements were not recorded. Their statements were recorded on the next day and this, therefore, is a suspicious circumstance creating

doubt about veracity of those witnesses. Apart from the general submissions, the counsel for each of the accused made separate submissions in defence of his accused. Those will be considered at appropriate place.

13. On the other hand learned APP for the State contended that this was a full proof case with no doubt whatsoever about the role of the accused in the murder. He contended that the incident had taken place in a broad day light at 4.00 p.m. in the factory or gala of deceased Khamkar where admittedly other employees of deceased Khamkar were present. Out of them four had witnessed the incident and merely because they were the employees of deceased Khamkar, they had no enmity with any of the accused and, therefore, they had no reason to falsely implicate any of the accused. The learned APP also contended that all the accused used their deadly weapons mercilessly and repeatedly causing as many as 34 injuries. The incident was lasted for quite a considerable time and, therefore, this gave sufficient opportunity to all the eye witnesses to see and observe all the accused and then to identify them in the identification

parades subsequently held.

14. The learned APP contended that there were no serious infirmities in the identification parades. They were conducted independently by SEM and nothing damaging is brought out in his evidence. He also contended that the so called presence of the police officer at the time of first identification parade cannot be a circumstance to disregard the evidence. Because no particulars in this regard are brought on record. Regarding non-examination of panchas, who were present at the identification parade, the learned APP contended that when no doubt is created by the cross examination of SEM in the parades held by him, then it was not necessary for the prosecution to examine the panchas. Further non-production of notes prepared by SEM is not at all fatal, because the SEM was not accepting nor maintaining and preserving the notes and when he has stated that he immediately prepared the memorandum then there are no reasons to disbelieve the SEM. Therefore, according to the learned APP, the fact that the four eye witnesses had sufficient opportunity to identify the accused and that the accused have been

identified in the parades clinchingly proves the guilt of the accused.

15. Regarding recovery of incriminating articles, the learned APP contended that the seizure and recovery of those articles from the spot and at the instance of the respective accused was amply proved. The articles were sent to the Chemical Analyser. They were found to contain blood, though the blood group was not conclusive. Apart from this, three of the accused had minor injuries to their hands. They got themselves treated on the very same day of the incident from the private doctors and the prosecution has examined those doctors and since no explanation was offered by the accused about their injuries, the presence of injuries on the person of the accused directly supports the prosecution case. Because the weapons used by the accused were deadly and sharp weapons and, if as many as 34 injuries were caused by means of those articles, the accused were bound to suffer minor injuries to their hands.

16. In this regard, the advocates for the accused contended that if it was for the

prosecution to explain the injuries on the person of the accused and if no explanation is coming from the prosecution, the accused were not bound to give any explanation about the injuries.

17. The learned APP also contended that so far as accused No.4 is concerned, he was known to all the employees because he had worked with them. He could be arrested only after a long period of one year. A revolver and cartridges were recovered from him and the forensic expert has given clear opinion that it was the same revolver which was used by him against the deceased and, therefore, according to the prosecution, all the ingredients of offences were proved beyond reasonable doubt and this was not a case to interfere with the judgment of conviction for any reason whatsoever.

18. Now coming to the submissions of learned counsel Mr.Mundergi, appearing for accused No.1, his main contention was that if the witnesses P.W.1 to 4 were present at the scene of offence, there was no reason for the police to cause delay in recording their statements. It is necessary, in order to appreciate their arguments, to

consider the evidence of P.W.1 to 4 in this regard.

. P.W.1 - Nivruti Ghorpade, in para 17 of his testimony and cross examination, has stated that from the time of incident, till arrival of the police, he did not leave the gala. Police made efforts for searching empties or lids pieces, but they were not able to trace it. After that, PI Patil took all the employees to the police station and they were at police station throughout the night and, persistently, during this period, the police officers were enquiring with all of them about the incident and as they were not able to tell the facts, they were detained throughout the night.

. P.W.2 - Bahadur Jaiswal, in para 5 of his examination in chief, has stated that the police took him to the police station and made enquiries with him and recorded his statement. In para 13 of his cross examination, he has stated that the police took him to the police station to make enquiries and recorded his statement. He has further stated that after enquiry, all the five persons including, this witness P.W.2, were

relieved by the police on next day morning and during the night, the police officers were enquiring with them as to how the incident had happened and about other details.

. P.W.3 - Vilas Vishnu Kamble, in para 3 of his examination in chief has stated that the police has recorded his statement at police station on next day. In the cross examination, in para 10, he has stated that after the incident, all the labours including P.W.1 to 4, were together in the company. All of them were taken in the night to the police station and he remained at the police station till the next day morning. The police officers were making enquiries with them about the incident and, the enquiry was to know or to reach near a clue. Then in para 14 he has stated that The inquiry in the night of 22.2.97 was because the police were not able to get proper clue of the assailants from them. The inquiries were made by Sr.Police Officers for two times. He also stated that the police did not man-handled or threatened or coerced them in the night.

. Then P.W. 4 - Tanaji Kisan Wani, in para

3, has stated that when the police arrived at the spot, these 4-5 persons were taken to the police station where the statement of this witness P.W.4 was recorded. In the cross examination, in para 11, he has stated that they were at police station till next day morning and the police were persistently making inquiries with them and on the 2nd day morning i.e. on 23.2.97 his statement was recorded.

19. From these admissions of all the four witnesses i.e. P.W.1 to 4, learned counsel Mr.Mundergi and all the defence counsel, contended that if the FIR was recorded, as alleged by the prosecution, on 22.2.1997 itself, at 17.10 p.m. and if P.W.1 Ashok, who had given the FIR, has given all the particulars and when all the four witnesses were in the custody of the police right from the evening of 22.2.1997, there was no reason for recording their statements on the next day morning and if without any reason recording of statements was delayed, then this has created doubt about the veracity of these witnesses and their presence on the spot as eye witnesses. We do not find any merit in this submission. It is true that the FIR, as lodged

by P.W.1, was recorded at 5.00 p.m. on the same day of incident. But FIR is not the last word of investigation. It is beginning of the investigation and, if other three witnesses were claiming to be the eye witnesses or were the eye witnesses, then there was no wrong committed by the police in getting them in police station through the night and then recording their statements on the next day morning. It has to be noted here that in the FIR lodged by the P.W.1 he has disclosed the name of only person and he has given description of other assailants. Rightly, therefore, in order to fix identity of those assailants, the police wanted to make further inquiry from remaining three witnesses. Then after recording the statements and drawing of panchanama, making inquiries from others in that industrial unit was also bound to follow because many persons assembled there. It is almost likely that police were trying to verify whether any of the other persons in that industrial unit was knowing the accused by name or whether any of them could give particulars necessary for identification or necessary for fixing identity and, therefore, if in this background the statements of these four witnesses were recorded

on the next day morning, no wrong was committed nor it can be said that there was delay in recording the statements. Therefore, this circumstance is not at all sufficient to create any kind of doubt about the presence of these witnesses and, the accused cannot get any advantage from this fact. The witnesses have stated that when they were in the police station, there were no threats or coercion upon them.

20. The next challenge to the evidence of these witnesses was on the ground that they were the employees of the deceased and, therefore, they were giving evidence at the instance of relatives of their employer. No where in the cross examination of all these four witnesses anything is brought on record that these four witnesses had any grudge against either accused No.4 Satish or other accused, nor any enmity was brought on record and, therefore, merely because these four witnesses were the employees of deceased Khamkar, it does not create any doubt about their testimonies. To the contrary, they are most natural witnesses being present in the factory at the relevant time. Their statements before the court are consistent to the case of

the prosecution.

21. The next attack on the evidence of these four witnesses was about identification of the accused by them in the identification parades. We consider this aspect regarding each of the accused separately. So far as accused No.4 is concerned, he was a person behind the attack. Because it was at his instance the deceased was attacked and done to death. All the witnesses have stated that they were known to Satish by name and face and, therefore, identification of accused Satish by all the witnesses in the parade is most natural.

22. So far as identification of all the accused is concerned, as per the evidence of P.W.1 - Ahsok Nivruti Ghorpade, in the 1st identification parade he identified accused No.1 Yogendrasingh. This parade was held after 20 days of incident. Then 8 days thereafter accused No.2 Sanjay Kage was identified. 15 days thereafter accused No.3 Sachin Badambe was identified. As per the evidence of this witness P.W.1 no identification parade was held for accused No.4.

. As per the evidence of P.W.2, he identified accused No.1 in the first parade and there were three parades only.

. According to P.W.3 there was identification parade for accused No.4 and he identified him and also in the court. There were four parades.

. As per the evidence of accused No.4, in the first identification parade he identified accused No.1. Then in the 2nd identification parade he identified accused No.3 and, in the 3rd identification parade he identified accused No.2. But this witness (PW.4) has stated that he had gone to his native place, therefore, he did not take part in the 4th identification parade but he has identified accused No.4 in the court.

23. So far as identification of accused No.4 is concerned, he was arrested about one year after the incident. He was known to all the witnesses. They have identified him in the parade as stated above and/or in the court. No

defect in the 4th identification parade, so far as accused No.4 is concerned, was pointed out to us.

24. So far as accused No.1 is concerned, he was identified by the witnesses as stated above. His advocate Mr.Mundergi contended that the cross examination of P.W.1 was taken over by Mr.Mahajan, advocate for accused Nos. 2 & 4, therefore, cross examination by Mr.Mahajan to be read as cross examination for accused No.1. This cross examination about identification parade is to be found from para 18 onwards. According to this witness (PW 1), PI Patil accompanied him to the gate of jail and took him inside the jail. He has stated that because he was called repeatedly at the police station, he was acquainted to some of police officers by their faces and the police officer whom he was recognizing by face was present in the parade room. Further this witness has stated that the SEO did not enquire with him as to whether police had shown him the suspect anything prior to identification parade. Therefore, according to the learned counsel Mr.Mundergi, if the police officer was present at the time of identification

of accused No.1 by all the four witnesses and the SEM has not asked whether the suspects were shown to the witnesses, then there is a breach of mandatory provisions and the entire evidence of parades is liable to be rejected.

25. So far as identification of accused No.1 is concerned, he was identified by P.W.1. P.W.2, who also identified accused No.1, has stated that after P.W.1 identified accused No.1, he went in the jail and he identified one of the persons who was assaulting deceased Khamkar. However, advocate for the accused No.1 contended that when this witness was asked to identify those accused in the Court, he answered that he had gone to the jail on three occasions and it will be difficult for him to whom he pointed in the 1st parade or in the 2nd parade. Therefore, the defence lawyers contended that if P.W.2 is unable to identify the accused in the Court, then there is no identification of the accused. Because identification in the court is important and vital. P.W.3, about identification, has stated that he identified accused No.1 in the parade and the identification was with reference to the role of accused No.1 about using Khanjir (dagger). In

the cross examination, about this identification, nothing is brought out on record to create a doubt about the identification parade. However, this witness, in para 8 of his cross examination, has admitted that during all the four parades, the SEO did not ask him whether he had seen any of the accused before conducting the parade. As stated earlier, this witness (PW 3) has stated that he identified accused No.1 as a person using a dagger and has also stated that after the parade, his additional statement was recorded by the police. He was cross examined in this regard. He has admitted that at that time he was not knowing the name of the accused and he learnt the name of accused No.4 after going to his company i.e. on 12.6.1998. He did not disclose the name of the accused as Yogendrasing. He was confronted with this statement wherein name of Yogendrasingh is there in his statement. Similarly after subsequent identification parade dated 19.3.97, according to him, he has not given the name of accused Sanjay Sudhakar Kage and in the statement dated 2.4.97 he has not given the name of accused Sachin Ganpat Badambe.

26. Thereafter P.W.4, who attended three

parades, in the 1st parade he identified accused No.1. In the 2nd parade he identified accused No.3 and in the 3rd parade he identified accused No.2. He also admitted in his cross examination that the SEM did not ask him whether the accused were shown to him earlier to the parade.

27. Therefore, it will be clear that the attack of the defence side on the evidence of these four witnesses regarding identification parade is of the following nature.

. Firstly the SEM did not ask any of the witnesses, whether the accused or the suspects were shown to them before holding the parade. Secondly, so far as P.W.1 is concerned, the police officer was present in the parade room at the time of holding the parade. Thirdly, the persons of similar appearances were not kept in the parade. Fourthly because accused No.3 was wearing spects, he was identified. This has come in the evidence of P.W.3 who identified accused No.3 because he was wearing the spects. In the cross examination he has stated that in the third parade dated 2.4.1997 he was called in the jail. Accused No.3 was wearing spects on that day and

none-else i.e. none of other dummies was wearing spects. Therefore, the learned counsel Mr.Gupte, appearing for the accused No.3, contended that if only one person i.e. accused No.3 was there in the parade wearing the spects, then it was easy for P.W.3 to identify him and since other dummies were not required to and called upon to put on spects, the identification losses its evidentiary value.

28. It is true that before holding the parade, the SEM did not ask any of the four witnesses whether the suspects were shown to him before holding the parade. It is true, as discussed above, that there are deficiencies in the parades and one more being that according to the evidence of SEM, he has taken notes and then prepared the memorandum of parade. But the notes were not made available and panchas were not examined and, therefore, there is no evidence that the memorandum was prepared as per the notes.

29. So far as this aspect of the matter is concerned, we do not find any substance. The evidence of SEM is absolutely clear. He has stated that the memorandum was prepared by him in

the jail itself and then handed it over to the police. There is nothing on record to doubt the veracity of SEM. He was working as SEM since 1989 and conducting the parades till then and therefore on this count his evidence cannot be disbelieved or suspect.

30. So far as other deficiencies are concerned, the question is, whether the incident was such that it could give sufficient opportunity to the witnesses to see the accused. Now in this regard, it has to be noted that the incident of assault has taken place in a broad day light at 4.00 p.m. Secondly the incident took place in the industrial gala of deceased Khamkar where all the four witnesses were present. Thirdly, one of the accused/assailant i.e. accused No.4 was known to all the witnesses because he had worked with them in deceased Khamkar's unit for quite a long time and fourthly the presence of about 34 injuries on the person of deceased Khamkar clearly shows that the incident has lasted for quite a long time. All these circumstances clearly show that witnesses P.W.1 to 4 had sufficient and ample opportunity to observe each of the assailant by his face.

31. Our attention was drawn to the fact that the trial court, while asking the witnesses to identify the accused in the court, did not permit the accused to change their Sr.Nos. in which they were sitting. This has come in the evidence of P.W.1, where in para 6 the court has noted as under :-

> "The accd. persons are persistently, changing their sitting position without the Courts intervention, and making it little difficult to recognize them by their respective serial numbers, hence, the accd. are directed to sit as per their serial numbers, reff, in the charges."

The counsel for the accused contended that if the accused were not permitted to change their sitting orders in the court, then it was easy for the witnesses to identify them in Court. Out of four witnesses, P.W.3 has clearly stated that he is unable to state which of the accused was identified in which parade. Witness P.W.4 has stated that he was not present when

identification parade of accused No.4 was holding. It would have been better if the court had permitted the accused to shift their sitting orders when the witnesses were to be asked to identify them. But that alone coupled with the aforesaid deficiencies do not affect the identification of the accused at all for the reasons that the incident took place in a broad day light at 4.00 p.m. in the factory of deceased Khamkar. Presence of all the witnesses is undoubtedly and independently proved. They are natural witnesses. The incident has lasted for quite a long time giving full opportunity to the witnesses to recognize and identify the accused.

32 About three identification parades, the prosecution has examined P.W.19 - Krishna Medhekar. He was working as SEM since 1989. He had conducted three parades in this case viz. 12.3.97, 19.3.97 and 2.4.97. He has proved all those memorandums at Exhibits 54, 55 and 56. In the cross examination he has stated that during each of the three parades, he had written points on a paper and then in the jailer room he prepared memorandums. He also stated that he

read out the contents of the memorandums to the respective panchas. In his cross he has stated that he was not aware if a suspect has any burned mark or any special feature on his face or body, then dummies, to be selected, should have also similar marks. He also stated that he did not find it necessary to ask the suspect whether he was confronted with identifying witnesses at any time prior to the parade or, he did not ask the witnesses whether they were confronted to any of the suspect before holding the parade. From these admissions of the SEM the defence lawyers contended that the whole parade looses its evidentiary value.

33. The next piece of incriminating evidence against the accused is about the presence of injuries on their persons. The learned APP in this regard drew our attention to the fact that accused Sonusing had injury on his person as a result of attack by him along with others upon the deceased. P.W.9 Dr.Yogesh Shah was examined by the prosecution in this regard. He has stated on 22.2.97, at 7.00 p.m. this accused came having bandage on his right hand, there was bleeding injury. This doctor examined the

patient, opened the wound, the wound was cut lacerated wound (CLW) and he required stitching. After giving local anaesthesia, Doctor stitched the wound and give him injection of Tetanus. He produced the papers i.e. the treatment papers at Exhibit 29 and, when questioned, the accused explained that the injury was as a result of some domestic work. The witness identified accused No.1 as the same person. There is no effective cross examination of this witness and to the contrary, in the cross examination the doctor stated that the injury could not be called as a normal injury in normal life. Then prosecution also examined Dr.Arjun Pol (PW.25). He has stated that on 22/2/97 at about 9-45 to 10-00 p.m. two of the accused persons viz. accused Nos. 2 and 4 went to him or were brought to his dispensary for treatment. Local anaesthesia was given. Entries were made in the register maintained by the doctor but those persons were given their names as Ajay Haldankar and Ganesh Sitaram Deshmukh. These names were entered at Sr.Nos. 85 and 86. These are at Exhibit 70 colly. He issued certificates about the injuries and treatment given vide Exhibit 71 colly. and when he was required to identify those two

persons, he identified accused Nos. 2 and 4 as the person to whom he had given the treatment and who had injuries to their hands. He stated that the injuries to the accused who represented himself as Ganesh Deshmukh was serious. It was due to a sharp edged weapon. Similarly the injury to the person who represented himself as Ajay Haldankar was also serious. Both the patients were admitted. There were two CLWs on the left leg of Ajay Haldankar caused by sharp edge cutting weapon. The Doctor denied possibility of the injuries being self inflicted. He also stated that the patient Ajay Haldankar, with those injuries, was able to walk or move quickly with little pains and, the injury to Ganesh was to his left forearm and it was a deep injury. This was painful injury. He also asked history of the injuries, but that was not recorded because the treatment was material. There is no cross examination to challenge the veracity of the witness or to create a doubt about his testimony.

34. The learned APP contended that out of the four accused, three were having injuries on their persons. They got themselves examined

immediately on the day of assault i.e. on 22.2.97 and, the presence of those injuries on the persons of accused coupled with recovery of three deadly sharp cutting instruments like dagger, chopper, and also looking to the fact that about 34 injuries were caused to the deceased Khamkar fully corroborates the case of the prosecution that the accused were the assailants. He also contended that there is no explanation from the accused as to why those injuries were received by them and in what manner.

. In this connection the learned counsel appearing for the accused contended that it is for the prosecution to explain the injuries on the persons of the accused and if the prosecution does not give explanation then the defence is not bound to explain. In other circumstances, this argument may be valid. But looking to the nature of assault, the weapons used, period taken for assault on deceased, as discussed above, and presence of about 34 injuries on the person of deceased clearly lends to strong corroboration to the case of the prosecution that these accused were the assailants. It is pertinent to note

that accused Nos. 2 and 4 changed their names when they went to Dr.Pol (PW.25). But even then doctor had identified them in Court after lapse of about two years. This is a very strong circumstance against the three accused as stated above.

35. Thereafter there is an evidence of recovery. So far as accused No.4 is concerned, when he was arrested in some other offence, a revolver was found with empty cartridges. As per the report of forensic expert, it is the same revolver from which shots were fired at the deceased. Then all other weapons were recovered at the instance of the accused. One of the weapons dagger was found on the spot. That was recovered from the spot.

36. Regarding this recovery of these weapons and blood stains clothes, submissions of the defence were that the recoveries of weapons are from open place accessible to anybody; they are not properly and legally proved; the report of the C.A. about the blood stains clothes and the weapons is inconclusive. It is necessary to scrutinize this aspect of the matter in detail.

37. P.W.32 - Sadashiv Laxman Patil is the important witness in this regard. He was duty PI attached to N.M.Joshi Marg, Police Station in 1997 and on the date of incident. Accused No.1 arrested on 7.3.97. On 9.3.97 accused No.1 volunteered to make certain statement regarding clothes worn by him at the time of incident. Two panchas were called. Statement of accused No.1 was recorded. Accused No.1 then led the police party to Bohri Chawl, common passage, Ramtekdi Road, Siwri and in presence of panchas and accused No.1, one full shirt with blue-black pin colours checks, and flowers and blue colour full pant were recovered. He has also stated that the panch for this panchnama Shri Sawant avoided to remain present in the court and, therefore, this witness (PW 32) filed report (Exhibit 108) to that effect.

38. Thereafter there is an evidence of PW 12 - Kamlakar Kisanrao Ylamkar - the PI. He has stated that on 4.3.97 he was on duty and keeping vigil in the premises and vicinity of Kalyan Court along with staff. While performing such duty, he found 5 persons (boys) in suspicious

condition standing before Deepak Hotel at Kalyan. He informed his staff about these five persons and all of them surrounded those five persons. Two persons were escaped. Three persons were caught in presence of panchas. Their search were taken and choppers were found from each of them concealed at back portion beneath their pant. This witness identified accused No.2 as the person who was amongst those three persons. Panchanam was marked at Exhibit 34. The weapon (chopper) - Article 11 was also identified and the slip bearing his signature. This witness (PW 12) has also stated that he noticed injury to one of the fingers of accused No.2 Sanjay Kage at that time. Then from Kalyan this accused No.2 Sanjay Kage was transferred in this case. The cross examination of this witness is concluded in certain paras. Nothing is brought out at all to create a doubt about this arrest of accused No.2 and recovery of chopper at his instance in presence of panchas. The chopper recovered is described in the panchanama (Exhibit 34). The total length of the chopper recovered from accused No.2 Sanjay Kage is 17.5 inches and blade is 13.5 inches. This chopper was also examined by us as Muddemal in this case.

39. Then, prosecution has examined P.W.13 - Govind Sawant. He was police constable who apprehended accused No.4 and recovered form him a country made Katta (firearm) with four cartridges and a Rampur knife with button. This witness (PW 13) has stated that on 14.4.98 he was attached to Mahatma Phule police station. He heard about a firing incident. Therefore, he proceeded to Valhipick chowk. It was about 10.00 a.m. After firing some persons were found running towards Patri Pool area in a rickshaw. This witness - Govind Sawant along with others chased them in another rickshaw and ultimately, they were successful in nabbing accused No.4 who gave his name as Gopinath Jadhav. But he was identified in court by this witness (PW 13) as accused No.4 - Satish Rawji Karangutkar. When this accused No.4 was searched a country made Katta (firearm) with one round in his left side pant packet and 4 cartridges and a Rampuri Knife with button were recovered. Thereafter the matter was reported to the police station. PI Momin then called panch and a detail panchanama was prepared. This witness identified the firearm which was recovered from accused No.4. He also proved

connecting documents as Art.12, 12A and 12B. This witness was cross examined by the defence. Nothing is brought out to contradict or falsify this witness. He was present when the panchanama was prepared. The firearm was loaded. Only defence put to him was, the accused was not apprehended in the manner stated by the witness and also nothing was recovered from the accused. Both the suggessions, of course, were denied by this witness. Then revolver cartridges were sent to the forensic expert. The lead head recovered from the body of deceased Khamkar was also sent along with. The forensic expert has given his opinion that the revolver, recovered from accused No.4, was used for firing at deceased Khamkar.

40. Then P.W.21 - Clifford Shivkar was examined by the prosecution in respect of the statement made by accused No.3 under section 27 of the Evidence Act leading to the discovery of chopper and clothes. This witness (PW 21) has stated that on 30.3.97 he was called by NM Joshi Marg police to act as a panch. In his presence the accused No.3 Sachin made a statement to point out a chopper used by him and thereafter a panchanama was prepared. Thereafter in a jeep

the accused No.3 took the leading party to a room on ground floor at Santacruz Golibar. There were logs in front of the room. The accused put his hands in between the logs and wall of the room and took out a chopper. A panchanama was prepared. Then accused took the leading party to the first floor of the said building and a black coloured pant was given by the accused. It has red spots. It was also recovered. This witness (PW 21) identified the panchanama as Exhibit 64 and he also identified the chopper and the pant. He also identified the slips (Art.16). This witness has also stated that the accused has disclosed his name as Sachin Badambe (accused No.3). It has come in the cross examination of this witness that this witness was dealing in software business. Nothing is brought out in his cross examination to shatter this witness or to create a doubt about his testimony.

41. Then the prosecution has examined P.W.24 - Prasad Ghosalkar. This is a panch witness about recovery of clothes at the instance of accused No.2 - Sanjay Kage. The recovery is of Shirt and jean pant. This witness has stated that he was called on 17.3.97 by the N.M. Joshi

Marg police to act as a panch. The accused - Sanjay Kage disclosed that he had kept a shirt at Vashi Sector No.17. A panchanama was prepared. In a jeep the accused took all the leading party to Vashi. The concerned room was opened and the accused handed over shirt and jean pant having blood spots. A pair of white socks was also found. All those items were attached and sealed under panchanama Exhibit 68 and the slips were at Art.17 and 18. He identified the articles so seized from accused No.2 Sanjay Kage. It has come in his cross examination that this witness was working in a hotel. He was not knowing what panchanama is. He has stated that police opened the room from the bunch of keys carried from the police station. He is not a habitual panch. Nothing is brought out in his cross examination to create a doubt or suspicion about his testimony.

42. All this evidence of recovery from each of the accused regarding weapons used in assault and the clothes on their persons at the time of incident was properly scanned and scrutinised by the trial Court. The trial Court did not find any reason to reject this evidence. It is true

that wherever the discovery of incriminating articles from the accused was after a long time of the incident, no blood stains could be found on the weapons or on the clothes. But that does not absolve the accused at all. Eye witnesses - P.W.1 to 4 have identified the weapons. One of the weapons Khanjir was lying on the spot and when the police reached on the spot it was recovered from the spot itself. The defence lawyers contended that the C.A. report is inconclusive about the blood grouping. The fact remains that wherever the articles had blood stains, human blood was found in the C.A. report. According to Mr.Gupte, the learned counsel appearing for accused No.3, the chopper was recovered from open place. But the specific place where the chopper was kept was pointed out by the accused No.3 himself. Firstly, this is not open place and secondly, the coppper was taken out by the accused No.3 from the logs and the wall intending specific knowledge of the accused about keeping the chopper there.

43. It will be, therefore, clear from the appreciation of the aforesaid evidence that the prosecution has succeeded in proving the guilt of

the accused to the hilt. There is direct evidence of four eye witnesses who had seen all the accused assaulting brutally and murdering Khamkar, causing as many as 34 injuries and one of the accused using revolver for causing fire arm injuries. The eye witnesses are supporting by prompt lodging of FIR, recording of statements of the witnesses without unnecessary and undue delay, recovery of Khanjir from the spot, recovery of choppers and revolver at the instance of the accused, recovery of clothes put on by them. There may be lapses in the identification parades, but for the reasons stated by us, all the four eye witnesses had ample opportunity to identity the accused and, therefore, all these circumstances were rightly accepted by the trial court in convicting all the accused. There is, therefore, no merit in all these appeals and, the same are required to be dismissed. Hence, we pass the following order :-

:ORDER:

All the three Appeals i.e. Criminal Appeal No.662 of 1999, Criminal Appeal No.626 of 1999 and Criminal Appeal No.663

of 1999 are dismissed.

[D.G.DESHPANDE,J]

[V.M.KANADE,J]